

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

RUTH XIAOYU ZHANG et al.,

Plaintiffs and Appellants,

v.

NESTOR H. LLERENA et al.,

Defendants and Respondents.

B288875

(Los Angeles County
Super. Ct. No. KC068411)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Dan Thomas Oki, Judge. Affirmed.

Law Offices of Bin Li, Bin Li, Sichen Wu; Kenner Law
Group and Jason J.I. Yang for Plaintiffs and Appellants.

Ritchie, Klinkert & Gutierrez, James E. Klinkert and
Paul J. Gutierrez for Defendants and Respondents.

This appeal arises out of the purchase and sale of real property located in San Dimas, California (the subject property). According to plaintiffs and appellants Ruth Xiaoyu Zhang (Zhang) and Hong Jun Lu (the buyers), defendants and respondents Nestor H. Llerena and Myrna T. Llerena (the sellers) either failed to disclose or concealed defects in the subject property prior to the completion of the sale. The buyers filed a lawsuit against the sellers, and the sellers moved for summary judgment. Because the buyers' purported reliance upon the sellers in connection with the transaction was not justifiable or reasonable, the trial court granted the sellers' motion.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

The buyers were interested in purchasing real property. Thus, they retained Jenny Kong (Kong) and US National Investment Group doing business as US National Realty as their real estate agents.

In September 2013, Zhang and Kong discovered the subject property. On or about October 1, 2013, escrow was opened.

On October 9, 2013, the sellers completed a document titled "Real Estate Transfer Disclosure Statement," which contained certain disclosure statements by the sellers. As is relevant to the issues raised in this appeal, the sellers answered "No" to the following questions: (1) "Fill (compacted or otherwise) on the property or any portion thereof," and (2) "Any settling from any cause, or slippage, sliding, or other soil problems."

During the escrow period, Kong hired Robbie Hett (Hett) with The Elite Group Inspection Service on behalf of Zhang to perform a home inspection of the subject property for the buyers.

Hett inspected the subject property on October 9, 2013. Upon completion of his inspection, he provided a summary to Kong; later, he prepared and provided a full inspection to Kong. The buyers received a copy of the home inspection report from Kong a couple of days after the inspection was completed.

Hett's summary and complete inspection report advised of the following: (1) Heavy patching in the dining room and evidence of settling; (2) Cracking in the ceilings, cracked floors, large gaps and settling in the counter tops and cabinets separating at the bar; and (3) Cracks and loose tiles in the roof. Hett specifically recommended that the buyers retain a licensed contractor for further evaluation.

In spite of Hett's findings and recommendations, the buyers did not retain a licensed contractor. They also did not cancel escrow. Escrow closed on November 13, 2013.

At some point, plaintiffs realized that the property was damaged.

On October 27, 2015, a site investigation was conducted by a structural engineer, who discovered that the subject property had signs of distress and cracks. The engineer determined that the property was founded upon fill material, and that the root cause for the damages to the property was based upon inadequate compaction of the fill soil prior to placement of the foundation.

Procedural Background

On May 2, 2016, the buyers initiated the instant lawsuit against the sellers. Their first amended complaint, the operative pleading, alleges three causes of action against the sellers: fraud, negligent misrepresentation, and breach of contract. Their

theory is that the sellers failed to disclose defects and conditions of the subject property.

On November 9, 2017, the sellers moved for summary judgment. They argued that the buyers' claims failed because they knew or should have known of the alleged defects in the subject property when they and/or Kong received Hett's report. Thus, the buyers could not demonstrate reasonable reliance, a necessary element of their fraud and negligent misrepresentation causes of action. As for the breach of contract cause of action, the sellers asserted that once the buyers learned of the alleged defects in the subject property, they had the right to cancel the sale. They did not do so, thereby waiving any alleged breach of contract by the sellers relating to the nondisclosure of defective conditions.

The buyers opposed the motion.

After entertaining oral argument, the trial court granted the sellers' motion for summary judgment. With respect to the fraud and negligent misrepresentation causes of action, it reasoned that Kong, the buyers' agent, knew of the alleged defects when she received Hett's report prior to the close of escrow. And her knowledge is imputed to the buyers. Thus, the buyers could not prove reasonable reliance, a requisite element of these causes of action.

The trial court also found that the breach of contract action failed. Because the buyers "had imputed knowledge of the alleged concealed facts," they also had the right to cancel the transaction. Instead of cancelling, they proceeded with the purchase and sale, thereby waiving "any alleged breach by [the sellers] with respect to any non-disclosure of defective conditions at the" subject property.

Judgment was entered, and the buyers' timely appeal ensued.

DISCUSSION

I. Standard of review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

"First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]' [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 71 (*Supervalu*).)

II. The trial court properly granted the sellers' motion for summary judgment

A. Fraud

The elements of a cause of action for fraud are: (1) a misrepresentation by the defendant, (2) his or her knowledge of its falsity, (3) his or her intent to induce another's reliance, (4) justifiable reliance by the plaintiff, and (5) damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) To establish justifiable reliance, the plaintiff must show that: (1) "the matter was material in the sense that a reasonable person would find it important in determining how he . . . would act" and (2) "it was reasonable for the plaintiff to have relied on the misrepresentation." (*Hoffman v. 162 North Wolfe LLC* (2014)

228 Cal.App.4th 1178, 1194.) “Although a plaintiff’s negligence in failing to discover the falsity of the statement or the suppressed information is not a defense to fraud [citation], a plaintiff’s particular knowledge and experience should be considered in determining whether the reliance upon the misrepresentation or nondisclosure was justified. [Citation.]” (*Ibid.*) Typically, “the question of whether reliance is justifiable is one of fact. [Citations.]” (*Ibid.*) Nonetheless, a court can decide the issue as a matter of law “‘if reasonable minds can come to only one conclusion based on the facts.’ [Citations.]” (*Ibid.*) In circumstances where the absence of justifiable reliance is one of law, the issue can be decided on summary judgment. (*Id.* at pp. 1194–1195.)

As the trial court aptly found, the buyers did not present any evidence of justifiable reliance. It is undisputed that the buyers’ agent, Kong, retained Hett, who prepared an inspection report that detailed potential defects with the subject property. In fact, Hett specifically advised the buyers to retain a licensed contractor for further evaluation. Hett provided his report to Kong, who then provided it to the buyers. Despite Hett’s recommendation, the buyers did nothing; instead, they closed escrow and purchased the subject property.

In urging us to reverse, the buyers contend that they were entitled to rely upon the sellers’ representations because the defects were “complex technical issues” that were “not easily accessible.” In a similar vein, the buyers assert that they demonstrated all elements of fraud because the defects were affirmatively covered up by the sellers. We disagree. The buyers retained an expert, who identified the defects that were visually accessible and recommended that they retain an additional

expert, a licensed contractor, to assess the subject property. They did not do so. They cannot now claim that they failed to take these advised measures because of alleged misrepresentations made by the sellers on the Real Estate Transfer form.¹

B. Negligent Misrepresentation

“The elements of [a cause of action for] negligent misrepresentation are well established. A plaintiff must prove the following in order to recover. ‘[M]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another’s reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on

¹ In their respondents’ brief, the sellers argue that any information supplied by Hett to Kong was imputed to the buyers. We need not address this issue because, as set forth above, it is undisputed that the buyers received a copy of Hett’s report. For the sake of completeness, we note that the sellers are correct. It is undisputed that Kong was the buyers’ agent in this transaction. And, “it is a well established rule in California that the principal is chargeable with, and is bound by the knowledge of, or notice to, his agent, received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends. [Citations.]” (*Trane Co. v. Gilbert* (1968) 267 Cal.App.2d 720, 727; see also Civ. Code, § 2332.) “So long as the agent was under a duty to disclose certain information, the principal is bound by the agent’s knowledge of that information whether or not the agent communicated it to the principal. [Citations.]” (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 10–11.) Because it is undisputed that Hett provided the inspection report to Kong, and she had a duty to communicate the material facts to the buyers, her knowledge is imputed to the buyers.

the misrepresentation by the party to whom it was directed; and resulting damage. [Citation.] [Citation.]” (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 983.)

For the reasons set forth above, the buyers’ claim for negligent misrepresentation fails. In light of the information provided to them by Hett (or imputed to them through Kong), the buyers cannot prove justifiable reliance.

C. Breach of Contract

The elements of a cause of action for breach of contract are: (1) the existence of a contract, (2) the plaintiff’s performance or excuse for nonperformance, (3) the defendant’s breach, and (4) resulting damage to the plaintiff. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

“Waiver is an intentional relinquishment of a known right after knowledge of the facts.” (*Supervalu, supra*, 175 Cal.App.4th at p. 76.) Accepting the benefits of a contract after knowledge of a breach can be a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440–441.)

The buyers allege that the sellers breached the purchase and sale agreement by failing to disclose certain defects with the subject property. But, as the sellers argue and as the trial court found, the buyers waived their claim of breach with respect to any alleged nondisclosures of defects at the subject property. After all, as set forth above, it is undisputed that the buyers were given notice via Hett’s inspection report of the alleged defects in subject property. Once they obtained that knowledge, the buyers could have cancelled the transaction. But they chose not to do so; instead, they opted to proceed with the purchase and sale of the subject property. By doing so, they waived any alleged breach by the sellers.

DISPOSITION

The judgment is affirmed. The sellers are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT